

Articles

DOMINANCE AND DIVERSITY: A RISK-REDUCTION APPROACH TO FREE SPEECH LAW

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*"Brains are as diverse as palates."
Benedict de Spinoza"*

I. INTRODUCTION

Free speech issues can be approached on several different levels. One familiar approach focuses on the most basic reasons for protecting freedom of speech in the first place. Another, a more particularized approach, focuses on the judicial tests used to resolve specific kinds of free speech cases. There is, however, a large and important, if underexplored, middle range between these two extremes. This Article explores the value of "mid-range" free speech theory and focuses on the degree of diversity of speech perspectives that is realistically available to the public. This Article will argue that expanding the diversity of voices realistically available generally reduces some important political risks, including the risks of committing serious errors of public policy, as well as failing to recognize or acknowledge, and then correct, those errors. In the area of free speech and in various other contexts, diversity and risk-reduction go hand in hand.

To begin, the focus on diversity should be situated more clearly between the most basic kinds of approaches to free speech on the one

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" *A Theologico-Political Treatise*, in 1 THE CHIEF WORKS OF BENEDICT DE SPINOZA 257 (R.H.M. Elwes trans., Gordon Bell & Sons 1951) (1670).

hand, and the more particularized approach focusing on specific judicial free speech tests on the other. Consider, first, the most basic approaches to freedom of speech. A number of possible reasons exist for deciding a free speech case one way or another. These reasons may be distinguished between so-called speech value reasons and non-speech value reasons. Non-speech value reasons often track broader, parallel reasons for deciding constitutional cases in general. For example, just as courts might rely on established case law precedent when deciding constitutional cases in general,¹ they might also rely on prior free speech case law when deciding a current free speech case,² regardless of the method used by the court in that precedent case. Alternatively, courts might try to decide a free speech case by determining the relevant intent of the Framers or ratifiers of the free speech clause.³ This would parallel the broader attempt to resolve constitutional cases more generally by reference to original intent.⁴ This approach to interpreting the free speech clause and the Constitution more broadly would not necessarily refer directly to any values thought to underpin the free speech clause or the Constitution itself.

The limitations of relying on non-speech value reasons for deciding free speech cases have long been clear. Relying on prior free speech cases as precedent, for example, leaves open the question of how to validate the earliest link in the precedential chain. Even if it is claimed that free speech precedents have always been available, some way to determine whether one prior free speech case is "closer" and more relevant than another is needed.⁵ It is difficult to convincingly resolve

¹ See Symposium, *Judicial Decisionmaking: The Role of Text, Precedent, and the Rule of Law*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991); Symposium, *The Crisis in Legal Theory and the Revival of Classical Jurisprudence*, 73 CORNELL L. REV. 401 (1988).

² See, e.g., *United States v. Eichman*, 496 U.S. 310, 317-21 (1990) (discussing and relying on prior flag burning case precedent of *Texas v. Johnson*, 491 U.S. 397 (1989)).

³ See, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 583 (1983) ("There is substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment."). But cf. *id.* at 583 n.6 ("It is true that our opinions rarely speculate on precisely how the Framers would have analyzed a given regulation of expression. In general, though, we have only limited evidence of exactly how the Framers intended the First Amendment to apply. There are no recorded debates in the Senate or in the States . . .").

⁴ See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669 (1995) (O'Connor, J., dissenting) (discussing the Framers' original intent regarding the Fourth Amendment); see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

⁵ In such cases, it will be difficult to choose among different, and perhaps conflicting, precedents without making some reference to legal principles and policies. See, e.g., HENRY

these problems without referring to possible values underlying the free speech clause.⁶

Several speech value reasons are commonly cited for deciding free speech cases one way rather than another. A number of such values, purposes, or goals are thought to inspire the free speech clause. Some free speech values are directly political, and others less so. Among the more directly political free speech values are those of promoting democratic self-government,⁷ imposing a check on governmental misrule,⁸ promoting political change,⁹ protecting dissent,¹⁰ and balancing political stability and political change.¹¹ Among the less directly political, or at least broader, free speech values are those of self-realization or autonomy,¹² tolerance,¹³ and the search for truth,¹⁴ in politics and in other arenas, through a marketplace of ideas.¹⁵

M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 396 (William N. Eskridge & Philip P. Frickey eds., 1994).

⁶ *Id.*

⁷ See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment: Masses Pub. Co. v. Patten*, 61 U. COLO. L. REV. 1, 12 (1990) (discussing free speech as linked to democratic legitimacy) [hereinafter Blasi, *Learned Hand*].

⁸ See, e.g., Blasi, *Learned Hand*, *supra* note 7, at 12; Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 142 (1989).

⁹ See, e.g., C. Edwin Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1982).

¹⁰ See STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 86-109 (1990).

¹¹ See, e.g., THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970).

¹² See JOHN STUART MILL, *ON LIBERTY* 75-140 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982); Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443, 446-47 (1998); Greenawalt, *supra* note 8, at 142-45; Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972).

¹³ See LEE C. BOLLINGER, *THE TOLERANT SOCIETY* (1986); Vincent Blasi, *The Teaching Function of the First Amendment*, 87 COLUM. L. REV. 387 (1987) (reviewing LEE C. BOLLINGER, *THE TOLERANT SOCIETY* (1986)) [hereinafter Blasi, *Teaching Function*].

¹⁴ See MILL, *supra* note 12, at 74-140; JOHN MILTON, *AREOPAGITICA AND OF EDUCATION* (George H. Sabine ed., Appleton-Century-Crafts 1951) (1644); Greenawalt, *supra* note 8, at 130-41; Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649, 715 (1987) (summarizing the argument regarding voluntary true beliefs, "biographical" truths, and tolerance); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995) (arguing without a reliance on "transcendent" truth). For a helpful discussion of John Milton's classic work, see Vincent Blasi, *John Milton's Areopagitica and the Modern First Amendment*, 13 COMM. LAW. 1 (1996). For an argument prefiguring Milton, see THOMAS MORE, *UTOPIA* 119 (Paul Turner trans.,

Not everyone accepts all of these free speech values, or even considers them all equally fundamental.¹⁶ Even if one were to convincingly pare down the above list of free speech values, however, a basic problem would remain. Often, it seems that legitimate free speech values appear on opposite sides of an interesting and important free speech case,¹⁷ or that the very same free speech value seems to appear on opposite sides of the case.¹⁸ It is often not clear how best to acknowledge any of the free speech values, let alone properly accommodate more than one such value.

This Article does not wish to reduce the list of possible free speech values,¹⁹ to assign them permanent, specific weights or boundaries,²⁰ or

Penguin 1965) (1516) ("[T]ruth would eventually prevail of its own accord—as long as the matter was discussed calmly and reasonably.").

¹⁵ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). But cf. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

¹⁶ See, e.g., Redish, *supra* note 12, at 593 (labeling individual self-realization as the single true basic free speech value). For critiques of free speech theories that seek to reduce the apparent plurality of free speech values to some single primary value, see Greenawalt, *supra* note 8, at 125-26; Blasi, *Teaching Function*, *supra* note 13, at 407-08 (stating Bollinger's theory underplays the free speech values of political "participation and the checking of power"); Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1142-43 (1983). For a critique of free speech value theory more generally, see Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1422-23 (1987). For slightly variant compilations of the most commonly cited free speech values, see EMERSON, *supra* note 11, at 6-7; Edward J. Bloustein, *The Origin, Validity, and Interrelationships of the Political Values Served by Freedom of Expression*, 33 RUTGERS L. REV. 372-73 (1982) (citing Emerson); Redish, *supra* note 12, at 591 (citing Emerson); Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267, 272-73 (1991); Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 4 (1989).

¹⁷ Given the expressive interests, and in particular the autonomy interests at stake on both sides, this might be said of many hecklers veto, captive audience, fighting words, or hate speech cases. See, e.g., Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 94 CAL. L. REV. 61, 82 (1996) (discussing hate speech as tending to silence, as opposed to encouraging (further) debate). Herein, we shall see a similar general phenomenon at work in the campaign funding case of *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), the mandatory student fee case of *Southworth v. Grebe*, 151 F.3d 717 (7th Cir.), *petition for reh'g en banc denied*, 157 F.3d 1124 (7th Cir. 1998), *cert. granted sub nom.*, *Board of Regents v. Southworth*, 119 S. Ct. 1332 (1999), and the public television congressional candidate debate case of *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998). For a discussion of *Forbes* and the diversity of electoral speech, see *infra* Section V.

¹⁸ Consider, for example, the potential role of the free speech value of autonomy on both sides, though certainly in different ways, in the cases cited at *supra* note 17.

¹⁹ See *supra* note 16 and accompanying text.

²⁰ For a discussion of some problems of absolutism, weight, balancing, and commensurability in the free speech context, see R. George Wright, *Does Free Speech*

even to add other free speech values into the mix. Enough attention has elsewhere been paid to identifying allegedly fundamental values underlying the free speech clause. In contrast, more work needs to be done at what might be called the second-order level. Free speech theory at the second-order level is between the "deep" theory of basic free speech values and the more particularized level of specific judicial free speech tests. More work at the second-order level might help resolve free speech cases more satisfyingly,²¹ or at least more candidly, and might help to reassess the various specific judicial free speech tests and standards currently employed.²²

In particular, this Article will discuss the idea of diversity, or its cognate in some contexts, diversification, as a second-order free speech value. It does not seek to add diversity or diversification as a rival fundamental free speech value. Nor is diversity, or diversification, itself a particular test to be judicially applied in some appropriate context.²³ Instead, diversity is thought of as a second-order value that can be used to critique specific judicial tests. Diversity can also be readily linked to free speech itself, to one or more of the fundamental free speech values, and to the important general value of risk reduction, in various contexts.

However paradoxical it may initially seem, results in some activity can often be improved by reducing one's subjective attention to that

Jurisprudence Rest on a Mistake?: Implications of the Commensurability Debate, 23 LOY. L.A. L. REV. 763 (1990).

²¹ For an example of a useful contribution along these general lines, see Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449-50 (1985) (stating that free speech jurisprudence should be oriented toward maximizing its usefulness during the most intolerant, repressive historical periods). For a critique, see George C. Christie, *Why the First Amendment Should Not Be Interpreted from the Pathological Perspective: A Response to Professor Blasi*, 1986 DUKE L.J. 683, 688-89 (rejecting strategic considerations in individual judicial decisionmaking, as well as the idea of a recognizable (political) "core" of the freedom of speech). For a response, see Vincent Blasi, *The Role of Strategic Reasoning in Constitutional Interpretation: In Defense of the Pathological Perspective*, 1986 DUKE L.J. 696.

²² The Supreme Court has adopted at least minimally different multiple-part tests for free speech in, for example, the specific areas of subversive advocacy, fighting words, prior restraint, libel, commercial speech, obscenity, hate speech, public employee speech, compelled affirmations, and speech in public fora. See GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 19-273 (1999).

²³ Thus, just as diversification is not a proposed rival fundamental free speech value, neither is it a particular single or multi-part judicial test to be employed in particular speech contexts, as are the tests referred to at *supra* note 22. Neither is diversity a matter of the relativity of truth. See, e.g., Steven Lukes, *Moral Diversity and Relativism*, 29 J. PHIL. EDUC. 173, 178 (1995) (critiquing "the relativist reaction" to moral diversity).

activity's ultimate values and increasing the focus on intermediate or instrumental values. Consider an illustration. Suppose that a group of golfers want to improve their golf game. Formulating this goal at too high a level of generality is unlikely to be practically useful. While they would not want to miss the forest for the trees, reminding themselves that they merely want to play better or to score lower would likely not be helpful from a practical standpoint.²⁴ The group could focus on what might be called the fundamental values underlying successful golf, including, but not limited to, power and accuracy in striking the ball.²⁵ Concentrating on such fundamental values, however, is by itself of only limited assistance.

More usefully, they will want to supplement their attention to, say, the fundamental value of power itself with second-order, more instrumental concerns. They will want to know about possible tradeoff rates between power and accuracy. Further, they certainly will want some general understanding of how best to generate power. This intermediate level understanding, in turn, may help them to choose among the various, more particular, maxims and bits of concrete advice they receive, akin to the particularized free speech tests for various specific contexts noted above.²⁶

In the game of golf, ideas such as muscle strength and flexibility, swing arc, torque, balance, weight shift, and rhythm help mediate between ultimate values, such as power, and more particularized possible rules, such as the proper extent of one's shoulder turn, the optimal grip, and moving or not moving one's head.²⁷ By way of analogy, in the free speech context, the idea of diversity, and particularly diversification as a risk-reduction strategy, can usefully mediate between the assumed fundamental values underlying freedom of speech and the various narrow doctrinal tests that might be chosen to decide particular cases.

It is possible, in theory, to develop so much confidence in one's second-order values that one could then use such values to critique and

²⁴ It is a matter of common experience, by the way, that there is not a perfect coincidence between playing better and scoring lower. A golfer can play better one week, but score higher, than the golfer's round the previous week.

²⁵ For the classic authorities, see BEN HOGAN & HERBERT WARREN WIND, *BEN HOGAN'S FIVE LESSONS: THE MODERN FUNDAMENTALS OF GOLF* (1985) and JACK NICKLAUS & KEN BOWDEN, *JACK NICKLAUS' LESSON TEE* (1992).

²⁶ See *supra* note 22.

²⁷ For discussion, see the authorities cited at *supra* note 25.

revise the received list of more fundamental free speech values.²⁸ This Article does not undertake that task. Instead, this Article will focus on expounding and defending the value of diversity in the free speech context, in other legal contexts, and in non-legal contexts as well. This Article will then illustrate how taking diversification and its risk-reduction seriously, as a second-order value, casts critical light upon some particularized free speech tests and doctrines and helps to resolve some difficult current free speech problems. Bearing the idea of diversity in mind when approaching free speech cases is both theoretically justified and of value in resolving such cases.

This is not to suggest that diversity and its risk reduction is invariably the decisive value, that it will always be easy to recognize diversity when we see it, or that it is impossible for the value of diversity itself, perhaps in different senses, to appear on both sides of a free speech case. No intermediary value can resolve every imaginable problem. The usefulness of focusing on diversity and risk reduction, however, can be shown through the illustrations below, focusing especially on participation in congressional candidate debates conducted on public television²⁹ and on mandatory university student fee issues.³⁰

II. DIVERSITY IN THE CONTEXT OF SPEECH: SOME INITIAL CONSIDERATIONS

The idea of diversity, in the law and elsewhere, is not clear, unitary, and unequivocal.³¹ There is, however, an established sense in which the idea of diversity is functionally crucial to the logic of free speech. Recognizing the linkages among democracy and diversity of characters,

²⁸ For a parallel argument that great confidence in the correctness of statutory and other levels of case adjudication can properly shed light on the best understanding of even "fundamental" level constitutional provisions, via a "coherentist" methodology, see R. George Wright, *Two Models of Constitutional Adjudication*, 40 AM. U. L. REV. 1357 (1991). For a broader discussion of a coherentist methodology patterned after the methodology employed by John Rawls, see NORMAN DANIELS, *JUSTICE AND JUSTIFICATION: REFLECTIVE EQUILIBRIUM IN THEORY AND PRACTICE* (1996).

²⁹ For a discussion of the diversity of speech and *Forbes*, see *infra* Section V.A.

³⁰ For a discussion of *Southworth v. Grebe* and diversity of speech on university campuses, see *infra* Section V.B.

³¹ See *Wessmann v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998) ("The word 'diversity' . . . does not admit of permanent, concrete definition."). See also Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1849 (1996) ("Everybody talks about diversity, but no one knows what it means."); Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811, 821-22 (1998) (same). But cf. Vince Herron, Note, *Increasing the Speech: Diversity, Campus Speech Codes, and the Pursuit of Truth*, 67 S. CAL. L. REV. 407 (1994) (stating that difference, distinction, and dissimilarity are generally key to diversity).

lifestyles, tastes, and free speech goes back at least as far as Plato.³² This recognition has been gradually developed in the modern era. For example, while John Milton's taste for diversity had its limits,³³ there is also a recognition in Milton of the linkages among free speech, diversity, and risk reduction. For example, Milton recognizes that "errors in a good government and in a bad are almost equally incident; for what magistrate may not be misinformed, and much the sooner, if liberty of printing be reduced into the power of a few?"³⁴ The many voices made available to us through freedom of speech may thus promote the quicker recognition and correction of governmental error, if they do not prevent the error in the first place.

John Stuart Mill's appreciation of diversity was also not literally boundless. Mill assumes that some experiments in living will fail as others succeed, and that as humanity improves and progresses along the path of self-perfection, there will naturally be more, and not less, uniformity of opinion and belief.³⁵ By analogy, there is today less, rather than more, diversity over whether the earth is flat. Mill remains, of course, a champion of great diversity of speech and lifestyle.³⁶ In this, Mill anticipates an important theme of twentieth century United States free speech law.

Judge Learned Hand, for example, echoed Milton and Mill in his understanding of free speech and diversity of perspective. Judge Learned Hand argued in particular that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."³⁷ The Supreme Court has itself observed that "[t]he right to

³² See PLATO, *THE REPUBLIC OF PLATO* 285-86 (Francis M. Cornford trans., 1945).

³³ See MILTON, *supra* note 14, at 52 (limiting the scope of free speech).

³⁴ *Id.* at 56. A generation later, Spinoza argued that "men thinking in diverse and contradictory fashions cannot, without disastrous results, be compelled to speak only according to the dictates of the supreme power." BENEDICT DE SPINOZA, *A Theologico-Political Treatise*, in 1 *THE CHIEF WORKS OF BENEDICT DE SPINOZA* 258 (R.H.M. Elwes trans., Gordon Bell and Sons 1951) (1670).

³⁵ See MILL, *supra* note 12, at 106 ("As mankind improve, the number of doctrines which are no longer disputed or doubted will be constantly on the increase . . .").

³⁶ See, e.g., *id.* at 108, 121 (referring to the advantages of "diversity of opinion" and expounding the argument of Wilhelm von Humboldt that originality and development require "freedom and variety of situations," leading to "individual vigour and manifold diversity.").

³⁷ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964); *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 603 (1953); *U.S. Healthcare, Inc. v. Blue Cross of Greater*

... speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets us apart from totalitarian regimes."³⁸ On more than one occasion, the Court has concluded that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"³⁹

Diversity in the sense of a "multitude of tongues" is not only an affirmatively good concept, but the absence of diversity in this sense is a bad, or at least a risky or dangerous concept.⁴⁰ Freedom of speech has in large measure been a response to our sense of individual limitations, partiality, narrowness, and fallibility.⁴¹ Individually, and in homogeneous groups, society is given to one-sidedness, to exaggeration, and to error. Free speech has thus reflected a "principle of epistemological humility"⁴² that is conscious of the risk of error, and seeks to avoid political unfairness in bearing the burdens of the risk of such errors.⁴³ Political history is largely a matter of errors in political judgment, and of slow, suppressed, or perhaps only partly successful attempts to correct such errors. The optimal political state of affairs is something approachable, but it is hardly something that is immediately recognizable. If political errors are recognized, admitted, and corrected, it is often, only after a slow and unnecessarily painful process. Diversity of speech, in expanding the practically available range of possible diagnoses and solutions, can reduce these costs.

This Article shall take up the value of diversity in several contexts below, in which it will emphasize the "defensive" role of diversity in reducing the risk of various sorts of undesirable outcomes. As it turns

Philadelphia, 898 F.2d 914, 928 (3d Cir. 1990); *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

³⁸ *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (quoting *Ashton v. Kentucky*, 384 U.S. 195, 199 (1966)). Presumably, the Court here means to emphasize the value of diversity itself, and not merely the specific right to promote diversity in particular, as a literal reading might suggest.

³⁹ *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 192 (1997); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790 n.29 (1978); *Citizen Pub. Co. v. United States*, 394 U.S. 131, 139-40 (1969); *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

⁴⁰ See *supra* note 37 and accompanying text.

⁴¹ In this, modern free speech law has followed Milton and Mill. See MILTON, *supra* note 15, at 56; MILL, *supra* note 12, at 77-78 (stating that "[a]ll silencing of discussion is an assumption of infallibility" and "ages are no more infallible than individuals.").

⁴² Redish & Lippman, *supra* note 16, at 281.

⁴³ See Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 *FORDHAM L. REV.* 971, 984 (1995).

out, diversity offers the possibility of important risk-reduction not only in the context of speech and political decisionmaking, but in other instructive contexts as well.

III. THE MANY CONTEXTS OF DIVERSITY: SOME USEFUL LESSONS

A. *The Analogy of Investment Diversification*

In a number of contexts, some sort of diversity, or its cognate, diversification, is widely credited with reducing unnecessary and undesired risks of various sorts. Certainly, this does not amount to an exceptionless pattern across all possible contexts. There are exceptions. In the field of military strategy, for example, concentration⁴⁴ as opposed to dispersion⁴⁵ of one's own forces is generally, though not invariably, considered a good thing.⁴⁶

Diversity in the field of business and economics, on the other hand, receives generally more favorable notices, though admittedly not in all circumstances or for all purposes. Corporate diversification in various respects is occasionally touted,⁴⁷ but there is no well-established understanding that corporations should, for example, ordinarily have interests in a wide variety of different products.⁴⁸ On the other hand, the

⁴⁴ See, e.g., SUN TZU, *THE ART OF WAR* 98 (Samuel B. Griffith trans., 1963) ("If I am able to determine the enemy's dispositions while at the same time I conceal my own then I can concentrate and he must divide. And if I concentrate while he divides, I can use my entire strength to attack a fraction of his."); CARL VON CLAUSEWITZ, *ON WAR* 276 (Anatol Rapoport ed., Penguin Books 1968) (1832) (referring to the "imperative" strategic law "to keep the forces concentrated.").

⁴⁵ See, e.g., B.F. LIDDELL HART, *STRATEGY* 332-33 (2d rev. ed., 1991) (discussing the modern development of the "dispersed strategic advance," under which "advancing forces should . . . be dispersed as much as is compatible with cohesion.").

⁴⁶ Certainly, there is no suggestion that sound military strategy counsels putting all of one's eggs typically in one basket, or relying excessively on any given technique or weapons system, to the exclusion of others. The costs in predictability, inflexibility, and inability to adapt are obvious. And there is, as well, obvious logic in dispersing military assets one expects, for example, to come under aerial bombardment. See, e.g., Bradley Graham, *Skies Clear, NATO Rains Bombs; Clinton Vows Relentless Attack*, WASH. POST, Apr. 6, 1999, at A01.

⁴⁷ See, e.g., John Byrd, et al., *Diversification: A Broader Perspective*, 40 BUS. HORIZONS, Mar.-Apr. 1997, at 40 (referring to diversity not only of a corporation's products, but of shareholders, supplies, plant equipment, customers, and geopolitical influences as well).

⁴⁸ See *id.* Underperforming lines or divisions may wind up being subsidized by better performers under the corporate umbrella. *Id.* The benefits of diversification in such cases may also be outweighed by the extra difficulty in one management team's running diverse businesses efficiently. See *A Survey of Corporate Risk Management: Too Hot to Handle?—The Art of Risk Spreading*, 338 ECONOMIST, Feb. 10, 1996, at 516. This problem, of course, simply

very idea of profitable corporate specialization implies that other, separate corporations are doing many other, perhaps complementary, things, which really amounts to a form of diversity at a higher level.⁴⁹

In the narrower area of investment strategy, diversification is more unequivocally embraced. Diversification permits the reduction of some important risks.⁵⁰ While the logic of not putting all of one's investment eggs in one basket has long been appreciated,⁵¹ the mathematics of investment portfolio diversification is a more recent development.⁵² The logic of portfolio diversification has been broadly endorsed across the law, in trusts,⁵³ pensions,⁵⁴ and other fiduciary decisionmaking areas.⁵⁵

As it turns out, a carefully selected investment portfolio can be less risky than any single one of its individual investment components.⁵⁶ The goal is to find investments that tend not to vary together in their value, and that are indeed negatively correlated, if not perfectly negatively correlated.⁵⁷ It is often thought, for example, that gold stocks tend to be only weakly correlated, if not negatively correlated, with the movement of a broader market basket of stocks in general.⁵⁸

Such an investment risk-reduction strategy offers, by way of analogy, some lessons for free speech policy. Freedom of speech may be

does not occur in the free speech context, where we do not expect any particular person or group to itself understand and apply all policy critiques without any assistance from outsiders. Knowledge in a democracy can and should be decentralized.

⁴⁹ See, e.g., ADAM SMITH, *THE WEALTH OF NATIONS* 8-9 (Edwin Canan ed., Univ. of Chicago Press 1976) (1904).

⁵⁰ See, e.g., BURTON J. MALKIEL, *A RANDOM WALK DOWN WALL STREET* 223-24 (1990). Risk in this context refers to something like the degree of "the variance or standard deviation of returns." *Id.* at 217.

⁵¹ See *id.* at 223.

⁵² See *id.* at 223-24. For some relevant mathematics, see Harry Markowitz, *Portfolio Selection*, 7 J. FIN. 77 (1952). Markowitz holds that "a rule of behavior which does not imply the superiority of diversification must be rejected both as a hypothesis and as a maxim." *Id.*

⁵³ See, e.g., John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 646 (1996) (referring to the 1992 revision of the RESTATEMENT OF TRUSTS); Robert J. Aalberts & Percy S. Poon, *The New Prudent Investor Rule and the Modern Portfolio Theory: A New Direction for Fiduciaries*, 34 AM. BUS. L.J. 39, 52 (1996) (same).

⁵⁴ See Langbein, *supra* note 53, at 646 (referring to 1974 federal ERISA statute).

⁵⁵ See *id.*; Aalberts & Poon, *supra* note 53, at 52.

⁵⁶ See, e.g., MALKIEL, *supra* note 50, at 226.

⁵⁷ See *id.* at 225-27.

⁵⁸ See *id.* at 226. More loosely, we can imagine that in a given city, there may be a negative correlation between sales of rain hats and of sun block, or of portable fans and space heaters, on any given day.

at its optimal not merely when many people are talking and listening, but when the potential diversity of the messages delivered is preserved and encouraged. When different perspectives are encouraged from a variety of speakers, unnecessary social risks, including unnecessary delays in detecting and correcting political mistakes, may be reduced. In particular, the expression of either of two negatively correlated perspectives should not unnecessarily be discouraged. If one view tends to seem most persuasive when another view seems least persuasive, and vice versa, unnecessary social risks may be reduced by encouraging the expression of both views.

Just as a selected pair of investments may reciprocally offset some of each individual investment's riskiness, so a pair of separate ideas may offset the risks, limitations, one-sidedness, or other disadvantages of either idea by itself. A crucial disanalogy, however, must be pointed out. In the investment field, a careful analysis may uncontroversially reveal which investments, historically, have a mutually negative correlation. Further study may suggest some reasons why this negative correlation may continue into the future.⁵⁹ One can consciously craft an investment portfolio on this basis. Feedback, in the form of the actual performance of this type of portfolio, is ongoing, clear, and unequivocal. In contrast, however, one should distrust most government attempts to consciously craft a limited "portfolio" of supposedly mutually offsetting or mutually correcting ideas, with an eye toward reducing various social risks. Allowing a government to identify a set of potentially valuable ideas to serve as a corrective to its own possible errors would simply reraise the problem of governmental bias and fallibility.

Plainly, one would not trust a government's judgment when determining the primary long-term social risks associated with its own policies.⁶⁰ One would not trust a government's judgment as to the degree to which those risks can or should be offset.⁶¹ Either would one trust a government's judgment as to which ideas, critical of the government's own policies, are the most persuasive or the best at reducing any risks of the current government policy.⁶² One might well

⁵⁹ It is, for example, not difficult to imagine why portable fan sales will tend to negatively correlate with space heater sales over some short time frame, even given any reasonable price reductions or price increases in view of anticipated demand.

⁶⁰ A related logic is developed at length in Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

⁶¹ See *id.*

⁶² See *id.*

expect, instead, a certain tunnel vision or other ideological bias on the part of a government in power. A government may see only a fairly narrow range of plausible alternative policies, with its own current policies at the ideological center. Other alternatives are thought impractical, or themselves one-sided. Similarly, a government may irrationally undervalue, or exaggerate its differences with, what the rest of the world sees as rather closely related alternative policies.

In any event, one would be rightly reluctant to trust a government to choose a portfolio of contrasting ideas to balance the risks of its own policies. Nor would one trust any other centralized decisionmaker, or any popularly elected body, to select or revise such a supposedly optimal portfolio of ideas. A long and unpleasant history of ill-judged governmental repression and myopia suggests that as a rule, one is better off with a broad range of ideas, however currently plausible or implausible, that is not screened or filtered by any authoritative governmental evaluation process.⁶³

Our portfolio of ideas, largely the current survivors of the competition of the marketplace,⁶⁴ should thus generally not be subject to further winnowing by the government. That "marketplace" may already reflect a good deal of governmental influence, and may already be biased against unfamiliar ideas. The investment portfolio analogy, however, raises a further problem. Investment diversification does not require an enormous number of particular investments.⁶⁵ Could it be prudent, therefore to believe that social risk reduction requires only a certain limited number of alternative ideas, and that any diversity of ideas beyond that point adds little further risk-reduction?

Assuming that additional diversity of ideas beyond some chosen point will add little further risk-reduction is both a dangerous and typically unwarranted practice. The same epistemic humility that

⁶³ This is not to suggest that ideas cannot be subject to bigoted repression by private action, apart from government sanction. See MILL, *supra* note 12, at 67. Rather, the point is that ideas should not, in addition, be subjected to this sort of value assessment by the government as well. Certainly, there is no obvious reason to believe that popular governments will tend to revive and legitimize ideas suppressed by private groups or general public opinion.

⁶⁴ See *supra* note 15 and accompanying text.

⁶⁵ See, e.g., Leslie P. Norton, *Power of Concentration: Risk Aversion and Diversification Are Overrated, Says a Money Manager*, 78 BARRON'S, Apr. 27, 1998, at 40 (discussing a situation where a particular money manager opts for a mutual fund composition in which ten stocks may make up as much as 45% of the overall portfolio).

underlies free speech law in general suggests that one would not assume that a government understands the nature and degree of all the risks of all of its policies, or how much speech of what kind is necessary to optimally reduce those risks.⁶⁶ One can, instead, well imagine that governments tend to underestimate the risks of their policies, and to understate the ideal range and amount of speech critical of those policies.⁶⁷

The risks of a general governmental policy, especially over the long term, are likely to be much more multidimensional and more difficult to clearly envision and quantify than the risks of typical investments. For example, among the risks of fighting the Vietnam War in a particular way may be that public attitudes not only about military involvement, but also about government in general, may persist for many years. The public's investment objectives, on the other hand, typically do not reach quite the same level of complexity, uncertainty, and nonquantifiability.

This is not to suggest that the risk environment for investments is simple in any absolute sense. It plainly is not. There is some overlap between investment risks and government policy risks. The complexity of investment risk helps to account for the fact that optimal portfolio diversification may require dozens or even hundreds of particular investments.⁶⁸ Even assuming that the risks of political and social decisionmaking are no more complex than those of investments, a good deal of diversity in the marketplace of ideas already seems required by this analogy. Dozens or even hundreds of critiques may not suffice to appropriately reduce the risks of slow error recognition and correction of any political regime.⁶⁹ Such a number of critiques of any government or general government policy would nevertheless involve a great deal of diversity of speech.

Bearing in mind that the best risk-reducing portfolios involve investments, or in the analogous case, ideas, that are only weakly

⁶⁶ See *supra* note 42 and accompanying text.

⁶⁷ See *supra* notes 60-63 and accompanying text.

⁶⁸ See, e.g., Langbein, *supra* note 53, at 648-49 ("Although much of the benefits of diversification can be achieved with a carefully selected smaller portfolio, optimal diversification probably requires a portfolio containing hundreds of issues.").

⁶⁹ Let us bear in mind, though, that American presidential and congressional elections rarely involve more than two to four candidates deemed "serious." See *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998); *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*) (discussing typical congressional and presidential campaign scenarios).

correlated, or even negatively correlated, with one another,⁷⁰ one begins to appreciate that a great amount of diversity can be involved in dozens or hundreds of critiques of a given general policy. Dozens of different critiques, uncorrelated or negatively correlated, along different dimensions of a given governmental policy would give quite a bit of diversity, and would give a basis for avoiding excessive "investment," or excessively long investment, in that policy. It is far from clear that under the current political regime, the general public has, even in a cybernetic era, realistic access to anything like several dozen uncorrelated critiques of even the most crucial government policies.⁷¹

It would, for this reason alone, be implausible for a government to argue that its policy has been criticized in so many uncorrelated ways, that one has already exhausted the benefits of diversity, and that additional, different kinds of critique would add little or no further risk reduction.⁷² After all, to be of value, a critique need not itself be flawless. However, when the institutional, ideological, and personal biases and blinders of political decisionmakers are added in,⁷³ it becomes especially difficult to trust a government's judgment that further critiques of their policies would add little further reduction of risk, and, therefore could be safely suppressed. Left to their own judgment, most institutions may genuinely perceive themselves as already rich in cultural and intellectual diversity, even when, to an outsider, they are not. Governments surely are not immune to this phenomenon of overestimating one's own institutional diversity.

⁷⁰ See *supra* notes 57-58 and accompanying text.

⁷¹ For a discussion of current media concentration, see *infra* notes 119-24 and accompanying text. Consider also the limited number of media outlets in any given market and the positive correlations in editorial positions on many issues adopted by the major media. Whether developments in Internet technology will promote realistic access to dozens of genuinely distinct perspectives on most issues is unclear. See *infra* notes 125-29. One problem is that an apparent rich diversity of Internet voices may still reflect filtering effects of the less richly diverse major media voices.

⁷² Note, by way of comparison, that even investment fund managers may be tempted to cast aside achievable benefits of diversification by trying, however vainly, to outguess the market by predicting which assets will perform best, thereby unbalancing their portfolio. See, e.g., Augustin Hedberg, *Diversification; The Proven Way to Cut Risk and Protect Profits*, MONEY, Sept. 1, 1988, at 62.

⁷³ See *supra* note 60 and accompanying text.

The investment portfolio analogy thus suggests that while any government must inevitably make "bets" by adopting certain policies,⁷⁴ free speech requires that governments hedge those bets by tolerating the expression of multiple, diverse, and potentially valuable critiques of those policies. Hedging governmental policy bets via free speech enables the society to more quickly appreciate and correct governmental misjudgments, and to minimize the "groupthink" problem in collective decisionmaking.⁷⁵

This does not suggest that governments should in general avoid risky substantive policies, or that the risk reduction effects of free and diverse speech are so important that every other policy goal should be sacrificed.⁷⁶ The hedging of bets may, in certain contexts, involve some risks of its own.⁷⁷ Nevertheless, it is also apparently the case that, hedging one's bets in a broad problem-solving context by simultaneously pursuing complementary solution strategies,⁷⁸ can reduce both the risk of not reaching a solution⁷⁹ and the average solution time as well.⁸⁰ Overall, the analogy to investment diversification supports the view that free speech, as the unconstrained practical

⁷⁴ See MILL, *supra* note 12, at 78 (recognizing that government must in the end adopt some particular policy, amounting to a commitment to the belief that the policy will turn out for the best).

⁷⁵ For a concise discussion of hedging as a risk reduction strategy, see *Lost in a Maze of Hedges*, ECONOMIST, Oct. 3, 1992, at 84. For the related problem of insufficient genuine diversity of perspective in formulating government policy, see IRVING JANIS, VICTIMS OF GROUPTHINK (1972) (discussing the pathology of group decisionmaking in which the desire for group cohesion and consensus begins to override the realistic evaluation of possible alternative policies).

⁷⁶ By analogy, the duty of investment diversification clearly does not imply that risk should always be absolutely minimized, even at the probable loss of great gains. See Aalberts & Poon, *supra* note 53, at 63 ("[T]he duty of care and caution does not imply that the trustee should avoid as much risk as possible by investing trust assets solely in securities like treasury bills, certificates of deposit, etc."). For a further, broader discussion of risk aversion and expected utility maximization in the free speech context, see *infra* Section VI.

⁷⁷ See Gerrard Gennotte & Hayne Leland, *Market Liquidity, Hedging and Crashes*, 80 AM. ECON. REV. 999 (1990) (discussing how even relatively little hedging could help account for stock market discontinuities or "crashes"). There are several ways of reducing the risk of crashes in the presence of hedging. See *id.* at 1017. Hedging of bets or diversification in our free speech context is of course a much less mutually interdependent, crash-inducing phenomenon.

⁷⁸ See Charles Seife, *Hedging Bets on Hard Problems*, SCIENCE, Jan. 3, 1997, at 33.

⁷⁹ See *id.*

⁸⁰ *Id.*

accessibility⁸¹ of an indefinitely large number of distinct and varied critiques of any given policy, reduces the risks of adopting and persisting too long in any potentially defective public policy.

B. *The Analogy of Biodiversity*

Over the past several decades, there has been increasing scientific and public policy interest in the idea of biodiversity.⁸² Biodiversity includes "ecosystem or community diversity, species diversity, and genetic diversity."⁸³ To some extent, biodiversity has been authoritatively endorsed in current public policy through legislation such as the Endangered Species Act.⁸⁴

There is an important functional analogy between biodiversity and investment portfolio diversification, and between biodiversity and a risk reduction approach to freedom of speech. The idea of complementarity or negative correlation between investments, for example, is crucial to optimal investment diversification.⁸⁵ Similarly, the idea of complementarity, or of differences in their optimal conditions of

⁸¹ By itself, the value of reducing risks through diversification requires that these diverse perspectives be genuinely, and not just somehow technically, available for actual public endorsement or other use. Once any given critique is thus practically available, however, the diversification value by itself does not tell us whether every single potential speaker should have an opportunity to express her already widely disseminated and discussed reasons for adopting or rejecting any given policy. The diversification value thus does not say much about the extent of person G's rights to merely repeat what persons A-F have just articulated. Allowing G to say her piece may, for example, be more important to G's autonomy or self-realization than to any virtues of diversity. See *supra* note 12 (discussing the free speech value of self-realization).

⁸² See, e.g., Oliver Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869, 870 (1997); Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1 (1997).

⁸³ See Houck, *supra* note 82, at 874. The well-known zoologist Edward O. Wilson defines biodiversity as "all hereditarily based variation at all levels of organization, from the genes within a single local population or species, to the species composing all or part of a local community, and finally to the communities themselves that compose the living parts of the multifarious ecosystems of the world." Edward O. Wilson, *Introduction*, in BIODIVERSITY II: UNDERSTANDING AND PROTECTING OUR BIOLOGICAL RESOURCES 1 (Marjorie L. Reaka-Kudla et al. eds., 1997). Biodiversity has also been more simply defined as "the presence of a large number of species of animals and plants." Ruth Patrick, *Biodiversity: Why Is It Important?*, in BIODIVERSITY II: UNDERSTANDING AND PROTECTING OUR BIOLOGICAL RESOURCES 15 (Marjorie L. Reaka-Kudla et al. eds., 1997). For further discussion, see, for example, John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174 (1998).

⁸⁴ 16 U.S.C. §§ 1531-1543 (1994). For relevant congressional findings, see 16 U.S.C. § 1531 (a) (1)-(5) (1994).

⁸⁵ See *supra* notes 49-58 and accompanying text.

performance, gives different constituents of the biosphere their "insurance value"⁸⁶ and their ability to contribute to the "resilience"⁸⁷ of the ecological system.⁸⁸

In this respect, biodiversity is paralleled by our appreciation that for every dominant ideology or idea, there are numerous possible complementary ideas that might be pressed into service when the costs of our currently dominant ideas seem to become too high. Even the best ideas have some limits to their application. When such limits are approached, the practical availability of diverse alternative ideas allows one to more quickly mitigate the otherwise severe shocks to the political system. The availability of alternative, unsuppressed ideas is thus, in the political realm, a form of "disaster insurance."⁸⁹

As it happens, neither the value of diverse speech nor of biodiversity is entirely a matter of avoiding disaster. Biological diversity also offers the raw materials of yet undeveloped "medicines, crops, pharmaceuticals, timber, fibers, pulp, soil-restoring vegetation, petroleum substitutes, and other products and amenities...."⁹⁰

⁸⁶ See Charles Perrings et al., *Introduction: Framing the Problem of Biodiversity Loss*, in BIODIVERSITY: ECONOMIC AND ECOLOGICAL ISSUES 1, 4 (Charles Perrings et al. eds., 1995).

⁸⁷ See *id.*

⁸⁸ Thus, Perrings argues that "[i]f wild grasses perform the same ecological functions as domesticated grasses but under a different range of environmental conditions, . . . then wild grasses have insurance value. They contribute towards the resilience of the system before shocks and stresses that alter those environmental conditions." *Id.* See also *National Ass'n of Homebuilders v. Babbitt*, 130 F.3d 1041, 1059 (D.C. Cir. 1997) (Henderson, J., concurring) ("Some studies show . . . that the mere presence of diverse species within an ecosystem (biodiversity) by itself contributes to the ecosystem's fecundity.").

⁸⁹ To join the biological and the political, merely for the sake of an example, one is doubtless better off discussing the costs, benefits, and possible range of magnitude of global warming before and after one acts, one way or another, than one would be by either authoritatively minimizing the phenomenon or treating it as dogma, regardless of any future evidence on the subject. For background, see, for example, Charlotte Booncharoen & John Gase, *International Commitment Toward Curbing Global Warming: The Kyoto Protocol*, 4 ENV'TL LAW 917 (1998); Christopher D. Stone, *Beyond Rio: "Insuring" Against Global Warming*, 86 AM. J. INT'L L. 445 (1992); William H. Rodgers, Jr., *The Porcupine's Dilemma: Strategic and Psychological Uncertainty in the Face of Global Warming*, 9 ARIZ. J. INT'L & COMP. L. 267 (1992).

⁹⁰ EDWARD O. WILSON, *THE DIVERSITY OF LIFE* 347 (1992). See also Eric Christensen, Note, *Genetic Ark: A Proposal to Preserve Genetic Diversity for Future Generations*, 40 STAN. L. REV. 279, 279 (1987) ("[E]ach species contains invaluable genetic material which could provide the key for monumental advances in both plant breeding programs and the fledgling science of genetic engineering."); *Babbitt*, 130 F.3d at 1053 ("To allow even a single species whose value is not currently apparent to become extinct therefore deprives the economy of the option value of that species.").

Biodiversity thus offers a certain "positive" payoff. Certainly, freedom of speech, too, involves affirmative payoffs, as well as the sorts of risk-reduction through diversity⁹¹ upon which this Article focuses herein.

Just as some forms of investment or business diversification may entail certain risks,⁹² biodiversity may itself pose, at least indirectly, certain risks of its own. While "numerous exotic plants have yielded life-saving drugs," much of this sort of bounty is currently untapped and difficult to estimate. This argument can admittedly be stood on its head.⁹³ Just as there are risks from the possibility of accepting potentially suppressible and currently unconceived bad ideas, there are also risks that some currently protected biological species will eventually unleash some hideous plague.⁹⁴

The best response to this possibility is to agree that in both the biological world and in the political world of speech, identifiable plagues, and, indeed, the sheer transmission of recognizable disease, should be suppressed.⁹⁵ Plagues, along with hate speech, are at least as likely to reduce overall biological diversity, or to reduce through intimidation the overall diversity of speech, as to enhance it. Few species carry any special plague threat, and even fewer forms of genuine idea expression carry any analogous "plague" potential.

One should also not assume that currently unappealing biological species and forms of speech are invariably without affirmative value. For example, the South American pit viper, although harmful, offers much value to our own species. Studies of the venom of one such species actually led to a better understanding of the blood pressure regulatory system in humans and to the development of a billion dollar per year hypertension prescription drug.⁹⁶ By analogy, much speech that seems to those in power to be virulently toxic may, in the judgment of

⁹¹ See, e.g., the self-realization value discussed at *supra* note 12 and accompanying text.

⁹² See *supra* note 48 and accompanying text.

⁹³ John Copeland Nagle, *Playing Noah*, 82 MINN. L. REV. 1171, 1208 (1998).

⁹⁴ See *id.* at 1212.

⁹⁵ See *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (discussing the penalty enhancement statute only); Richard Delgado, *Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); R. GEORGE WRIGHT, *THE FUTURE OF FREE SPEECH LAW* 58 (1990).

⁹⁶ See Thomas E. Lovejoy, *Biodiversity: What Is It?*, in *BIODIVERSITY II: UNDERSTANDING AND PROTECTING OUR BIOLOGICAL RESOURCES* 9 (Marjorie L. Reaka-Kudla et al. eds., 1997).

history, seem in some respects constructive and of some genuine value, if not entirely justified.⁹⁷

None of this implies that society should simply "freeze" ecosystems as they currently stand, allowing no species to disappear if it can be prevented,⁹⁸ or that society should somehow try to artificially preserve into the future just the current range of perspectives on public issues, and allowing as little dynamic change as possible. There is no point in pretending that the sky will fall if a few species inadvertently perish, or even perish as a result of deliberate human decision.⁹⁹ Of course, governments could also suppress a few quite specific ideas without actual disaster ensuing, but this could hardly be treated as sufficient grounds to permit any government to embrace such an option.

Current biodiversity policy under the Endangered Species Act is generally not to "allow society to decide that one bird is more important than another, or that we will save one animal but not another."¹⁰⁰ Society should, by analogy, view the rich diversity of ideas and ways of living, across contemporary and historical cultures, as the genetic material with which to fashion the best critiques of contemporary practice.¹⁰¹ Of course, this is not to suggest that either governments or private actors should treat all ideas and practices as of equal value. Quite the opposite is true. It is through an evenhanded, creative, continuing review of societies vast inventory of alternative possibilities that one can most intelligently criticize the current arrangements.

IV. DIVERSITY OF PERSPECTIVE AND FREEDOM OF SPEECH

It has rightly been argued that "[j]ust as diversity in the gene pool, in the variability of life on earth, is necessary for our survival, so is cultural diversity a great pool from which we can draw ideas and practices we need to live by."¹⁰² As a society, we at least profess to value diversity, of

⁹⁷ See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964) (public official libel case).

⁹⁸ See Nagle, *supra* note 93, at 1215.

⁹⁹ See Nagle, *supra* note 93, at 1215; Perrings et al., *supra* note 86, at 5 ("[I]t remains for future research to fix the boundaries to sustainable [biodiversity] losses . . .").

¹⁰⁰ Nagle, *supra* note 93, at 1172. *But cf. id.* (discussing the seven member committee entrusted with decreeing exceptions).

¹⁰¹ Attention to past practices, in one's own or other societies, implies neither that one thinks it desirable, nor that one thinks it possible, to restore unaltered, some previously discarded institution. The past provides resources, not templates.

¹⁰² Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1401 (1991).

one sort or another, as a matter of public policy,¹⁰³ and particularly in educational institutions,¹⁰⁴ though the constitutional law of such a valuation of diversity is at present controversial.¹⁰⁵

¹⁰³ See, e.g., *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (noting the FCC policy of "promoting diversity in programming"). But cf. *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) ("The commission never defines exactly what it means by 'diverse programming.' (Any real content-based definition of the term may well give rise to enormous tensions with the First Amendment . . .)"). Certainly the idea of speech diversity itself, or of enhancing speech diversity, is not unconstitutionally biased against any concrete viewpoint.

¹⁰⁴ See, e.g., Richard Delgado, *Why Universities Are Morally Obligated to Strive For Diversity: Restoring the Remedial Rationale For Affirmative Action*, 68 U. COLO. L. REV. 1165 (1997). A quick tour of the admissions page websites of some high ranking law schools suggests support for some forms of diversity. See, e.g., University of Wisconsin Law School, *Admissions Policy* (last modified Apr. 21, 1999)

<<http://www.law.wisc.edu/admissions/policy.htm>> (referring to "diverse skills, talents, and interests" and to "students from diverse cultural, political, geographic, and socioeconomic backgrounds"); Boalt Hall, *Background and Faculty Policy Governing Admission to Boalt Hall* (last modified Oct. 3, 1999)

<<http://www.law.berkeley.edu/admissions/policy.shtml>> (referring to "racially and ethnically diverse student bodies"); Columbia Law School, *Admission to the JD Program* (visited Oct. 7, 1999) <<http://www.law.columbia.edu/admissions/admsjd.html>> (referring to diversity of "background and interests"); Duke Law School, *Applying* <<http://www.law.duke.edu/admis/admissions.html>> (last modified Sept. 9, 1999) (referring to diversity in terms of "general background, geography and undergraduate institutions represented," and especially "minorities who traditionally have not been well represented in the legal profession").

¹⁰⁵ The axis upon which much of the constitutional law of diversity turns continues to be Justice Powell's opinion in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). Justice Powell refers in particular to "the educational diversity valued by the First Amendment." *Id.* at 316. For some doubts and disagreements as to the current status of this opinion, see *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) ("[A]ny consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."); *Hopwood v. Texas*, 84 F.3d 720, 724 n.11 (5th Cir. 1996) (Politz, J., dissenting from failure to grant rehearing en banc) ("[W]e are firmly convinced that, until the Supreme Court expressly overrules *Bakke*, student body diversity is a compelling governmental interest for the purposes of strict scrutiny."); *Taxman v. Board of Educ.*, 91 F.3d 1547, 1563 (3d Cir. 1996) (en banc) (finding that "the benefits flowing from diversity in the educational context are significant indeed," but nevertheless rejecting the school board's plan); *Messer v. Meno*, 130 F.3d 130, 136 (5th Cir. 1997) (citing *Hopwood* as holding unconstitutional "the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors"); *Lesage v. Texas*, 158 F.3d 213, 221 (5th Cir. 1998) ("'Diversity' . . . is not a compelling state interest that satisfies the strict scrutiny standard for the purpose of admissions at a public university."); *Ex Parte Rhodes*, 974 S.W.2d 735, 739 n.11 (Tex. Crim. App. 1998) (en banc) (accusing *Hopwood* court of "ignoring precedent" of *Bakke*). For the Court's current level of scrutiny in racial equal protection cases, see *Adarand v. Peña*, 515 U.S. 200, 227 (1995).

If more than one kind of diversity is valued, it is important to recognize the likelihood that not all forms of valued diversity will be perfectly correlated, and that the various forms of valued diversity cannot always be maximized simultaneously. The occasional need for tradeoffs among valued forms of diversity cannot be ruled out. However, it is at least equally important to recognize that, quite typically, the forms of diversity that society most values will be mutually reinforcing. The focus herein is on diversity of views as both contributing toward and reflecting freedom of speech. Cultural diversity is not merely some alternative sort of diversity with which one should expect diversity of expression to clash. Valued forms of diversity, with diversity of expression among them, will typically be mutually supporting, or at least compatible.

The very idea of diversity of "perspective" is useful in emphasizing the deep congruences between cultural diversity and diversity of speech and expression. In the main, it should be expected that if cultural diversity increases, given the increase in the number of cultural perspectives represented, so should the range of views that may be brought to bear on any given public issue. The idea of "viewpoint" links the idea of views, which one seeks to diversify, and the idea of a perspective, or the standpoint or point of view from which any given problem may be perceived. The ideas of cultural diversity and of diversity of expressible points of view are thus almost conceptually inseparable.

This does not, of course, imply that any given culture is likely to have a uniform, homogeneous point of view on any given subject. What, one may futilely ask, would be the current uniform African-American perspective on nineteenth century European opera? Wouldn't that perspective depend, among other factors, upon whether one happens to be a devotee of such music¹⁰⁶ or, perhaps, whether one has for a lifetime simply been denied any realistic access to that music?¹⁰⁷ Differences of background, resources, and experience within groups, and the fact of

¹⁰⁶ For merely a few examples, consider Marian Anderson, Leontyne Price, Shirley Verrett, Grace Bumbry, Jessye Norman, Kathleen Battle, and Denyce Graves. It might be noted that the number of leading African-American tenors in particular has historically been limited, for reasons discussed in, for example, Roslyn M. Story, *Survivor: Singer Thomas Young*, OPERA NEWS, Jan. 30, 1993, at 28.

¹⁰⁷ There are of course healthier reasons for differences of perspective within any cultural group as well. Further, to at least some degree, everyone is a member of more than one cultural group simultaneously.

inevitable multiple group membership for everyone, also contribute to the absence of monolithic cultural group perspectives.

It is important, though, to appreciate what this qualification does and does not show. It does show that diversity of perspective is not maximized by adding merely one or two representatives of any given cultural group to an ongoing mix of established voices. The one or two voices added in to represent that cultural group may not be typical, or what is almost as harmful from a free speech standpoint, is that the added voices may indeed be typical of that cultural group, thereby underrepresenting the genuine diversity of perspective within that group. This may leave others with a distorted, inaccurate, and narrow understanding of the experiences of the cultural group in question. Speaking merely for oneself can be challenging; speaking for all of one's varied cohorts, with some of whom one disagrees, may be either unappealing or impossible.

Diversity of perspective within any cultural group does not, on the other hand, imply that group experiences cannot be formative, or that experiences and perspectives cannot significantly vary by group. For example, the historical African-American experience with police law enforcement has been rich in its variety. The range of experiences, perceptions, and views of African-Americans regarding police tactics, however, do not simply mirror, and thereby confirm, those of whites.¹⁰⁸

One need not, for purposes herein, come to some conclusion as to how to maximize cultural diversity itself. Nevertheless, it is fair to ask how one should take advantage of cultural diversity in such a way as to optimize diversity of expression. One might, for example, argue that the ideal of maximizing diversity of expression requires what might be called maximum "uniform diversity" at the level of particular institutions and organizations. Under such a uniform diversity model, it would be ideal from the standpoint of diversity of expression if every particular institution was diverse in as many important respects as possible. Every individual organization would, ideally, look like

¹⁰⁸ See, e.g., Joe H. Stroud, *Simpson Trial Shows How Much Race Shapes What We See*, DETROIT FREE PRESS, Oct. 8, 1995, at 2K; John Riley, *Race and Deadly Force/Cops, Civil Rights: Shootings Ignite a National Debate*, NEWSDAY, March 14, 1999, at A05; Robert Polner, *An All-Time Low/Mayor's Approval Rating in Poll Dwindles to 40%*, NEWSDAY, April 9, 1999, at A03; Tom Topousis & Maggie Haberman, *Rudy Job Rating Hits New Low; Bad News in Post-Diallo Poll*, N. Y. POST, April 9, 1999, at 2. For a key contribution to the related area of statistical differences among races in jury service, see Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

America,¹⁰⁹ and thus, in that respect, in a loose sense somewhat like every other organization.¹¹⁰

Doubt may arise as to whether this form of cultural diversity unmodified, would either maximize or optimize diversity of expression. If every organization looked roughly like America—the face of the CEO might well vary widely—there might, despite such variety arise, certain commonalities of perspective that would be especially difficult to recognize and challenge because of their very pervasiveness and apparent naturalness. This might be a much improved and much moderated version of the blinded vision of those historical institutions that implicitly assumed that whiteness and maleness, for example, could encompass all useful perspectives. Cultural diversity is not, in itself, the sum of all possible social contexts.

Consider, for example, that if all organizations literally looked like America, even with permutations among the leaders, there would be no place for junior high schools, high schools, or universities solely for women.¹¹¹ Can one be entirely sure that the availability of at least a few women's schools, as an option, would not contribute to diversity of expression, even indirectly or over the long term? The question is not precisely of justice, equal protection, the educational efficacy of all-women schools, or even the range of choices available to women. Instead, it is whether even a few such all-women schools could contribute to optimizing the mix of voices and perspectives in the public discourse.

¹⁰⁹ Recall that the Clinton Cabinet was touted as one that "looks like America." See Ruth Marcus, *Clinton's Recipe for Cabinet: A Blend of Convention and Activism*, WASH. POST, Dec. 20, 1992, at A01. For certain residual anomalies, see, for example, Terry Zaleman, *Letters to the Editor: What About Asian Americans?*, WASH. POST, Jan. 8, 1993, at A18; Edward Walsh, *The Not So Rich; The Very Rich; A Cabinet That Looks Like America—To Their Accountants*, WASH. POST, Sept. 21, 1998, at A19.

¹¹⁰ Of course, the cultural or demographic dimension of authority within organizations could still vary among organizations. Every cultural group could, at least by virtue of random chance, presumably point to some organizations of which one of its members was, say, president or CEO. In this respect, organizations would not look like one another.

¹¹¹ For discussion of related general issues, see Beth Lief, *A Symposium on Finding a Path to Gender Equality: Legal and Policy Issues Raised by All-Female Public Education*, 14 N.Y.L. SCH. J. HUM. RTS. 1 (1997); Amy H. Nemko, *Single-Sex Public Education After VMI: The Case for Women's Schools*, 21 HARV. WOMEN'S L.J. 19 (1998); Tara Boland, Comment, *Single-Sex Public Education: Equality Versus Choice*, 1 U. PA. J. CONST. L. 154 (1998); Amanda Elizabeth Koman, Note, *Urban, Single-Sex, Public Secondary Schools: Advancing Full Development of the Talent and Capacities of America's Young Women*, 39 WM. & MARY L. REV. 507 (1998).

At a minimum, it seems implausible to rule out this possibility. However, if by saying that the availability of at least a few all-women schools might optimally enrich the diversity of speech, does that not thereby legitimize schools that stigmatize or exclude women? Would this not amount to a free speech defense in the name of institutional diversity as well for, say, the Virginia Military Institute's historic exclusion of women?¹¹²

There is no reason to concede that if the existence of a few women-only schools would optimize diversity of expression, then the existence of a few men-only schools would have a similarly beneficial effect on speech. Organizations of men and organizations of women need not be symmetrical in this respect. They may not be similarly near, or similarly distant, from the established center of cultural gravity on any particular public issue. Men's and women's organizations may not equally embody the already dominant cultural beliefs. Women's institutions in our culture may tend to a greater degree to generate and promote distinctive, non-dominant ideas. Men's institutions may, in contrast, tend to express ideas that are already well-represented in public discourse by other institutions.¹¹³

This is, at least, a possible difference between men-only and women-only organizations with respect to enhancing the diversity of speech. It is also at least possible, though less likely, that the existence of some men-only organizations might also contribute to increasing diversity of speech. If diversity of speech in such a case is a concern, then society must reflect upon all the constitutional values at stake. One should consider the marginal difference between the degree of diversity of speech with and without the male-only organizations at issue. Any such determination will to a degree be contestable and speculative. Care should be taken to remember that a newly coeducational institution may evoke new, unfamiliar ideas from both the men and the women affected.

¹¹² For the decision overturning this system on equal protection grounds, and requiring an "exceedingly persuasive justification" for such discriminatory practices, see *United States v. Virginia*, 518 U.S. 515 (1996), which Virginia defended on the grounds of the value of "diversity in educational approaches." *Id.* at 535. The Court observed that "Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth." *Id.*

¹¹³ Of course, there may well be other differences between men-only and women-only institutions for other constitutional purposes. See, e.g., Jennifer R. Cowan, Note, *Distinguishing Private Women's Colleges from the VMI Decision*, 30 COLUM. J.L. & SOC. PROBS. 137 (1997).

Society should, of course, take full account of the various constitutional burdens imposed on women by male-only organizations.

Doubtless some forms and degrees of discrimination are beyond the constitutional pale. In such cases, no reasonably anticipated additional diversity of speech could outweigh the discrimination required to generate that additional speech diversity. In closer, less egregious kinds of cases, one may want to look more carefully at the actual burdens on all parties, the range and value of alternatives realistically available to all affected parties, the status and prestige levels of the institutions involved, and the actual power relationships involved.

In particular, in a genuinely close case in which there may be a conflict between diversity of speech and cultural diversity in some form, the following factors in addition to the diversity of speech effects may need to be considered: What is the actual nature and degree of burden on the interests of any individual or group excluded or discriminated against by the organizations in question? How many organizations are threatening to impose such discrimination? What is their "market share?" Where do the discriminating organizations stand in the relevant hierarchies of social power and prestige? Do the discriminating organizations function in any sense as gate-keeping institutions? How many persons or groups look to the discriminating organizations for leadership? Crucially, what realistic, practically available alternatives, of what quality or prestige, remain available to those burdened by the discrimination in question?¹¹⁴ Do the discriminating organizations hold anything remotely like a geographical or other form of monopoly, or are there obvious practical substitutes available of at least equal value, as judged by the victims of discrimination? Are there any relevant considerations of sheer financial cost to those victims? What, realistically, will be their fate? Ultimately, of course, equal protection rights in particular must be respected.

These considerations may help with the close cases in which some form of diversity may cut against enhancing diversity of speech. They

¹¹⁴ Interestingly, the Supreme Court has been ambivalent about the constitutional relevance of alternative channels of speech available to a speaker. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (finding that, as constitutionally relevant, the restrictions on speech "do not unreasonably limit alternative avenues of communication"). But cf. *Schneider v. State*, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").

may also shed light on the cases that are not, as well. Part of the problem in the *United States v. Virginia*¹¹⁵ case may have been that, for a number of viable women candidates, there was little in the way of all-women or coeducational military training otherwise available that would be both practically accessible and of comparable value, quality, and prestige. In short, the women denied access to VMI on the basis of gender may have had few alternatives. This same set of considerations also suggests why it is even more important that the presidential cabinet "look like America" in some relevant respects, than the Board of Directors of some single, small, obscure, local, private enterprise.¹¹⁶

Assume that, on the basis of all these sorts of considerations, diversity of speech perspectives has been optimized. This does not by itself guarantee that the general public, or the audience for speech, will actually hear that optimal diversity of speech. Something of the diversity of speech can be lost in the communication process, or in the transmission of messages from speakers to potentially willing listeners. Speakers may have diverse messages to convey without being able to actually convey those messages. This problem has a number of dimensions, including the wealth or poverty of potential speakers.¹¹⁷

Of special concern, however, is the issue of major media concentration, and the possible ameliorative impact of increasing Internet use. The fear is that as the conveyance of news, information, and even entertainment devolves into fewer hands, the range and

¹¹⁵ 518 U.S. 515 (1996). See also *supra* note 113 and accompanying text. This Article is again merely assuming that, on the other side, a coeducational VMI somehow offers less additional diversity of speech than a male-only VMI. This assumption is questionable, given that both the men and women who experience a newly coeducational VMI may at least for some time have ideas to express that are not generally available from other sources. One thus might ask which contributes more to overall diversity of expression: the condition of coeducation at VMI, along with both male and female reactions thereto, or the contributions to continuing diversity of speech made possible only by a male-only VMI. Once some conclusion is reached in this regard, other sorts of constitutional considerations may then be applied.

¹¹⁶ Given that it is impossible for any relatively small group, including a presidential Cabinet, to mirror America – after all, some Americans are under the age of thirty, are disabled, or have been forced to drop out of high school or college – we must inevitably make some sort of implicit value judgments about which sorts of perspectives would most contribute to overall diversity of perspective and of speech within an organization. This judgment must then be squared with all other relevant constitutional and non-constitutional values, including sheer organizational effectiveness in carrying out any assumed mission.

¹¹⁷ See, e.g., J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

diversity of ideas being successfully transmitted tends to be reduced, thereby narrowing and impoverishing the range of ideas actually received by and realistically available to the citizenry. This fear was expressed half a century ago by Justice Felix Frankfurter. Frankfurter suggested that "[t]here are probably a lot more words written and spoken in America today than ever before, and on more subjects, but if it is true . . . that these words and ideas are flowing through fewer channels, then our first freedom has been diminished, not enlarged."¹¹⁸

As of a few years ago, the major television networks and a number of other mass media conduits were controlled by four corporate entities: General Electric, Westinghouse, Disney/Cap Cities, and Time Warner.¹¹⁹ In such cases, one may be troubled by the limited numbers involved. Beyond that, one may wonder, as with investment diversification above,¹²⁰ whether the perspectives of, for example, General Electric and Westinghouse are really negatively correlated in any relevant way.¹²¹ Their corporate response would, one might suspect, reflect what might be called the Iron Law of Internally Perceived Diversity: every major corporation and other significant organization perceives itself as (already) rich in internal diversity, regardless of which voices are absent or muted, and as significantly different from other major organizations, including its leading competitors. Thus, any concern that General Electric and Westinghouse share important commonalities of perspective may be rejected by insiders as a crude overgeneralization of their distinct and diverse corporate cultures.¹²²

In reality, these enterprises do share basic commonalities of value and perspective, whether they recognize those commonalities or not.

¹¹⁸ *Pennekamp v. Florida*, 328 U.S. 331, 355 (1946) (Frankfurter, J., concurring) (quoting E.B. White, *THE NEW YORKER*, Mar. 16, 1946, at 97).

¹¹⁹ See Mark Crispin Miller, *Free the Media*, *NATION*, June 3, 1996, at 9; see also, *On that Chart*, *NATION*, June 3, 1996, at 15 (James Fallows ed.) (accompanying joint discussion).

¹²⁰ For a discussion of the analogy of investment diversification, see *supra* Section III.A.

¹²¹ See *supra* notes 57-58 and accompanying text.

¹²² As a rhetorical question, one might ask, at another level, whether the current editorial and news-judgment policies of the *New York Times* and *Washington Post* are more different than alike. The same question might be posed of the *New York Post* and the *Washington Times*. Do their perspectives correlate negatively? More disturbingly, it is also possible to ask this question of, say, the *New York Post* and the *New York Times*, or, more generally, of the slew of monthly popular magazines devoted to glamour, celebrity, lifestyle, fashion, and entertainment. There is something of a common sensibility held by these magazines. In particular, their advertising and content pages tout what we may call distinctively "consumptionist" approaches to life and its problems. See R. GEORGE WRIGHT, *SELLING WORDS: FREE SPEECH IN A COMMERCIAL CULTURE* 12-77 (1997).

Their shared preference for consumptionist solutions of individual and even community problems is one example.¹²³ The basic problem with media conduits, from the standpoint of optimal speech diversity, is really not one of market power, oligopoly, market share, or any traditional antitrust concern.¹²⁴ Four genuinely different media conduits would be preferable to dozens of separately owned media conduits whose basic values, assumptions, and motivations are, for all their superficial variety, really quite similar. If those basic media values reflect, and are reflected by, the values embraced by other vital cultural institutions, the problem of limited free speech diversity becomes worse.

Will the technical advance and broadened accessibility of Internet technology significantly reduce this problem of constrictive media filtering? In the most optimistic mood, this seems possible.¹²⁵ Net advocates talk of decentralization, individual and group empowerment, interactivity, reduction of hierarchy, cost reductions, and even in some respects, the abolition of scarcity.¹²⁶ Can the Internet enable non-mainstream speakers to become realistically accessible to a wide audience?

There is much that might be said about freedom of speech and the Internet.¹²⁷ It is possible that as the Internet develops, its effects on freedom of speech will be mixed. One can imagine that the Internet and successor technologies will allow for faster exposure of particular provable lies committed by repressive governments. Photographs of a fresh mass grave can be quickly published to the world, bypassing censors. Responsive mainstream media may in turn republish those photographs, amplifying the underlying message. Further, at a minimum, even obscure groups and causes can have some sort of Internet presence, and thereby reach at least some fragmentary audience.

It is also an overstatement to say that Internet empowerment will typically involve individual and group self-absorption. At the very least,

¹²³ See WRIGHT, *supra* note 122.

¹²⁴ See Miller, *supra* note 119.

¹²⁵ See, e.g., Andrew L. Shapiro, *New Voices in Cyberspace the Net Could Become a Vibrant Alternative to the Media Oligopoly*, NATION, June 8, 1998, at 36.

¹²⁶ See generally *id.*

¹²⁷ See, WRIGHT, *supra* note 122, at 108-34; Floyd Abrams, *First Amendment Postcards from the Edge of Cyberspace*, 11 ST. JOHN'S J. LEGAL COMMENT. 693 (1996); C. Edwin Baker, *First Amendment and the Internet: Will Free Speech Principles Applied to the Media Apply Here?*, 11 ST. JOHN'S J. LEGAL COMMENT. 713 (1996); Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743 (1995); Cass Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757 (1995).

it is unlikely to be true that both the Internet promotes individual and group narcissism, and that Internet news and information will just be mainly an Internet version of familiar, mass-market, lowest common denominator news reporting. On the other hand, it also seems unlikely that the Internet will dramatically enhance popular interest in those persons we consider remote from our interests. There are websites devoted to African epidemics or mass starvation, but such sites are not guaranteed a large actual audience.¹²⁸ They must compete with a myriad of other websites for our scarce attention, and they must compete given our established values, interests, and priorities.

The most sophisticated Internet search engines do not increase the number of hours in the day, or do much to revise values in a prosocial direction. It is difficult to deny that the World Wide Web in particular is moving inevitably in the direction of increasing commercialization, and that commercial interests and commercial values are becoming pervasive.¹²⁹ Although we may wish to protect commercial speech on the Internet, however, commercial values are not simply neutral values. Less commercial values expressed on the Internet are likely to find themselves subtly dissonant against an increasingly commercialized background. In sum, it would be unrealistic to see the Internet as dissolving the problems normally faced by marginal voices seeking to obtain a broad, serious hearing. The Internet does not ensure optimal diversity of speech.

V. INCREASING THE DIVERSITY OF SPEECH: SOME IMPORTANT EXAMPLES

A. *Forbes and the Diversity of Electoral Speech*

The Supreme Court values diversity of speech, at least until diversity of speech is thought to come into conflict with some other free speech value. The Court's rhetorical support for diversity of speech may then be undercut by its substantive constitutional holdings. Perhaps the clearest example of this gap between rhetoric and holding comes in the well-known campaign finance case of *Buckley v. Valeo*.¹³⁰ In *Buckley*, the Court refers to the goal of "the widest possible dissemination of information

¹²⁸ See, e.g., *Southern Sudan: Testimonies of a Human Tragedy* (visited April 17, 1999) <<http://www.dwb.org/reports/ssudan.htm>>.

¹²⁹ See, e.g., WRIGHT, *supra* note 122, at 108-34.

¹³⁰ 424 U.S. 1 (1976) (per curiam).

from diverse and antagonistic sources."¹³¹ This language seems to value diversity of perspective. On a more literal level though, it calls not for wide diversity of perspective, but wide dissemination of ideas.¹³² It seems to be more important for many people to be reached by speech rather than having a wide diversity of voices doing the speaking.

This literal analysis of the Court's language may understate the intended emphasis on protecting and enhancing diversity of perspective. Nevertheless, it is clear, in the larger context, that *Buckley's* major theme is not to exalt diversity of free speech perspectives. While the Court in *Buckley* was badly fractured, the per curiam opinion maintained that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."¹³³ Admittedly, restricting someone's speech for the sake of enhancing someone else's does not always enhance diversity of speech. A government might rob from the speech-poor to give to the speech-rich, bringing the overall composition of public debate even closer to a monologue. It seems evident, however, that the *Buckley* per curiam opinion is unsympathetic to the idea of restricting anyone's speech to not only enhance anyone else's speech, but also to increase the genuine diversity of perspectives practically available for public consideration.¹³⁴ Typically, though, one should be able to think of many ways of enhancing speech diversity without violating anyone's free speech rights.¹³⁵

¹³¹ *Id.* at 49 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945) and *Roth v. United States*, 354 U.S. 476, 484 (1957))).

¹³² See *Buckley*, 424 U.S. at 49.

¹³³ *Id.* at 48-49.

¹³⁴ The tenor of the per curiam opinion would tend to see a restriction of A's speech in order to give B, C, D, and E for the first time a realistic opportunity to reach an audience as a violation of A's protected free speech rights. In a different context, see *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998). Of course, there should ordinarily be a number of ways of promoting greater diversity of speech, including equal general subsidies, that do not significantly restrict anyone's speech. A government fund, for example, that bought the same amount of newspaper or cyberspace ad space for "minor" electoral candidates as for "major," much better financed candidates, could well have some positive effect on diversity of speech without violating the speech rights of the well-financed candidates.

¹³⁵ See *supra* note 134. More fundamentally, public school curricula that provide basic background on various cultures and classes also reduce the obstacles such cultures and classes must face in intelligibly conveying otherwise unfamiliar perspectives to the general public.

*Arkansas Educational Television Commission v. Forbes*¹³⁶ illustrates how increasing diversity of speech might work in another context. *Forbes* involved the exclusion of an independent candidate from an Arkansas congressional district candidates' debate sponsored and televised by a state agency, the Arkansas Educational Television Commission.¹³⁷ The Republican and Democratic candidates for the particular congressional seat were invited to participate,¹³⁸ but the plaintiff Ralph Forbes, an independent ballot-qualified candidate, was excluded.¹³⁹ Forbes was a minor, previously unsuccessful candidate with little popular support, at least at the time of the debate.¹⁴⁰

The Supreme Court upheld the exclusion of Forbes.¹⁴¹ To reach this result, the Court utilized the frequently murky, if not at points arbitrary, public forum doctrine.¹⁴² For purposes of this Article, however, the crucial element of the Court's analysis was its weighing of the value of free speech diversity against the value of the public broadcaster's scope of editorial discretion, as a gatekeeper or filter, in granting or denying speakers' access to the broad viewing public.¹⁴³ This balancing process came out in favor of the latter.

The Court concluded that "Congress ha[d] rejected the argument that 'broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues.'"¹⁴⁴ Such a view might be termed the maximum diversity approach to broadcast access rights. Of course, to enhance speech diversity, there may be no reason to require that this be done through television broadcasting. It may be that speech diversity can be better enhanced through media other than television broadcasting. Nonetheless, something like an open access policy, at least for public broadcasting stations, might well enhance the diversity of

¹³⁶ 118 S. Ct. 1633 (1998).

¹³⁷ *Id.* at 1637.

¹³⁸ *See id.*

¹³⁹ *Id.* at 1638.

¹⁴⁰ *Id.* at 1637-38.

¹⁴¹ *Forbes*, 118 S. Ct. at 1644.

¹⁴² *Id.* at 1641-43. For discussion of the Court's use of the public forum doctrine in *Forbes*, see R. George Wright, *The Illusion of Simplicity: An Explanation of Why the Law Can't Just Be Less Complex*, 27 FLA. ST. U. L. REV. (forthcoming 2000). For one recent example among many of the sheer unmanageability, if not arbitrariness, of public forum doctrine, see the majority and dissenting opinions in *Warren v. Fairfax County*, 169 F.3d 190 (4th Cir. 1999).

¹⁴³ *Forbes*, 118 S. Ct. at 1639-40.

¹⁴⁴ *Id.* at 1639 (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 105 (1973)).

views and perspectives available to the public, whatever disadvantages such a rule might involve.

In *Forbes*, the Court focused instead on the "freedom" of public and private broadcasters.¹⁴⁵ The freedom of such broadcasters involves the exercise of discretion and choice as to which speakers to present on which subjects.¹⁴⁶ This freedom is, thus itself, a matter of the broadcaster's own freedom of speech.¹⁴⁷ To restrict the broadcaster's editorial discretion would be to restrict the broadcaster's freedom of speech.

Unfortunately, though inevitably, the broadcaster's editorial discretion is exercised largely through decisions to exclude or limit the access of particular voices and perspectives to the broadcast media. To exercise the freedom of editorial discretion is, largely, to reduce the maximum potential diversity of broadcast voices to some lesser degree of broadcast diversity. Public broadcaster speech is, therefore, in large measure, a matter of the screening or exclusion of some of the otherwise maximum potential diversity of voices.

Which is more important from the overall standpoint of free speech itself: the freedom of the public broadcaster to screen some, but not all, of the diversity of voices on one ground or another, or the value to the speakers, to the viewers, and indirectly to the broader public, of enhancing the diversity of views available through public broadcasting? As seen above, there are a number of grounds, focusing on risk reduction,¹⁴⁸ for believing the latter to be particularly important.

There is no doubt that one should be sensitive to the unwieldiness of a political debate with perhaps a dozen participants, mainstream or obscure. A standard-format debate involving two to four candidates may be more coherent, more comprehensible, and more illuminating to most viewers than a debate with many more candidates.¹⁴⁹ The more

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

¹⁴⁷ See *id.* at 1639-40 (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 570 (1995) and *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994)).

¹⁴⁸ For a discussion of diversity in the context of speech, see *supra* Section II.

¹⁴⁹ See *Forbes*, 118 S. Ct. at 1643. If public broadcasting stations simply chose not to bother with debates involving practically manageable numbers of candidates, they could presumably be statutorily required to do so under *Red Lion Broad. Co. v. FCC*, 395 U.S. 367,

familiar the ideas, the more quickly and understandably those ideas can be conveyed to viewers. Less familiar and more diverse ideas, in a standard debate format, might result in a confusing "cacophony" of voices.¹⁵⁰ There is thus a sense in which a multi-party standard format debate "would result in less speech, not more."¹⁵¹

There are, however, important limits to the Court's conclusion that a greater amount of diverse speech is more confusing and unmanageable and therefore less, or less valuable, speech. It is, for one thing, largely self-reinforcing. The more exclusively one is exposed only to mainstream views, the more confusing and counterintuitive a non-mainstream view may seem. The narrower the range of ideas to which one is exposed, the more unwieldy and confusing an exposure to an expanded range of ideas will seem.

Certainly there is a sense in which a standard format debate, but with dozens of speakers, would be considered unwieldy or less than ideal from most viewer's standpoints. Nothing is sacred, however, about the current standard debate formats. Those formats have historically been changed and could be changed again.¹⁵² Similarly, human nature itself does not rule out grasping and appreciating a real diversity of expressed perspectives. One may currently find a real pluralism of perspectives to be unmanageable. Significantly, though, one would likely find equally unmanageable a debate format that involved our standing in the rain, for as much as three hours, to hear Lincoln and Douglas, even though we used to find this manageable.¹⁵³

Of course, listening to Lincoln and Douglas involved listening to only two familiar, mainstream perspectives. Nevertheless, is it really much easier to listen to those two perspectives without interruption for several hours than to listen, for a shorter time, or on separate occasions, to more perspectives? Standard debate formats may simply reinforce society's standard binary, dualistic approach to public issues. Why not depart from that standard format? Why not critically examine more perspectives, within manageable time frames, over a series of separate

393 (1969) ("[I]f present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues.").

¹⁵⁰ *Forbes*, 118 S. Ct. at 1643.

¹⁵¹ *See id.*

¹⁵² Note, for example, that the length of debates, and the extent of journalistic participation, has historically varied.

¹⁵³ *See THE LINCOLN-DOUGLAS DEBATES OF 1858* (Robert W. Johannsen ed., 1965).

programs? Is a possible increase in diversity of speech perspectives not worth the cost of adopting a range of debate formats?

To conclude the brief discussion of this example in a spirit of accommodation, a limited concession should be made. Excluding non-mainstream candidates from televised debates certainly need not amount to classic discrimination on the basis of viewpoint.¹⁵⁴ No reason exists to suppose that the public television station agreed more with some ideas expressed by the Republican and Democratic candidates than with those expressed by Forbes.¹⁵⁵ Further, there is admittedly no perfect correlation between the conventionality or unconventionality of one's views and one's standing in the public opinion polls.¹⁵⁶ This does not mean, however, that there is no relation between holding unpopular or non-mainstream views on the one hand and one's lack of political popularity or support, as a candidate, on the other. Unpopularity of one's political views is commonly linked to one's political unpopularity. One cannot reasonably conclude that excluding non-mainstream candidates on whatever grounds does not also tend to exclude non-mainstream ideas. The likely adverse effects on diversity of expression are inescapable.

B. *Southworth v. Grebe and Diversity of Student Speech on University Campuses*

Proper concern for speech diversity helps adjudicate cases in which there are free speech interests on both sides of the case. A further contemporary example is posed in *Southworth v. Grebe*¹⁵⁷ and several other loosely similar cases.¹⁵⁸ *Southworth* dealt with mandatory payment by public university students of a fee going directly to the student

¹⁵⁴ See *Forbes*, 118 S. Ct. at 1643-44. For a discussion of speech restrictions on the basis of viewpoint, see, for example, *Texas v. Johnson*, 491 U.S. 397 (1989) (holding the flag desecration statute unconstitutional).

¹⁵⁵ See *Forbes*, 118 S. Ct. at 1643-44.

¹⁵⁶ See *id.* at 1644.

¹⁵⁷ 151 F.3d 717 (7th Cir.), petition for reh'g en banc denied, 157 F.3d 1124 (7th Cir. 1998) (Rovner, J., dissenting from denial of petition for rehearing en banc), cert. granted sub nom. Board of Regents of the Univ. of Wisconsin Sys. v. *Southworth*, 119 S. Ct. 1332 (March 29, 1999). *Southworth* drew prompt academic commentary. See Kari Thoe, Note, *A Learning Experience: Discovering the Balance Between Fees-Funded Public Fora and Compelled-Speech Rights at American Universities*, 82 MINN. L. REV. 1425 (1998).

¹⁵⁸ See, e.g., *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032 (9th Cir. 1999); *Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994); *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992); *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985); *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983); *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982).

government association and then, in part, to various qualifying private student organizations that engage in a broad range of political activities, including political speech from particular perspectives on a number of subjects.¹⁵⁹

Such cases may, like the public television debate case, involve legitimate free speech interests on both sides. It is not necessary to minimize the possible free speech interests of the objecting students. At least in some imaginable extreme cases, these free speech interests could be significant. In such a case, it would not matter whether the mandatory student fee assessment is called a classic instance of compelled speech or not.¹⁶⁰ Nor, in such a case, would it necessarily be decisive that no portion of the assessed fee go directly and immediately from the objecting student to the political group the student finds objectionable.¹⁶¹ Surely, for example, one would have some sympathy for a Jewish student who must pay a portion of her fee, directly or indirectly, to an anti-semitic group that managed to qualify under the school's funding criteria.¹⁶²

This is not to suppose that reasonable persons would imagine that any given student actually supports any or all of the qualifying student

¹⁵⁹ See *Southworth*, 151 F.3d at 718-21.

¹⁶⁰ Cf. *Rounds*, 166 F.3d at 1037-38 ("[T]his case does not present an instance of compelled personal speech . . ."); *Southworth*, 157 F.3d at 1126 (Rovner, J., dissenting from denial of petition for rehearing en banc) (viewing student fees as supporting a broad forum for varied speech, and noting that "[t]herefore, there is no issue of 'compelled speech' here"). For examples of classic compelled speech cases, see, for example, *Wooley v. Maynard*, 430 U.S. 705 (1977) (involving the state motto uniformly required on passenger license plates); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (concerning a flag salute and the pledge of allegiance).

¹⁶¹ Cf. *Southworth*, 157 F.3d at 1125 (Rovner, J., dissenting from denial of petition for rehearing en banc) ("The complaining students are paying fees not to the challenged groups, but to the student government, which then uses the money to fund its own operations and over 100 student groups, regardless of viewpoint.").

¹⁶² It would admittedly be worse if the student's entire compulsory fee were devoted solely to some particular group or viewpoint the student found to be profoundly objectionable, but this is a matter of degree. The smaller the fee, and the more its symbolic and other effects are "diluted" by its dispersion among various other groups, the better. Nevertheless, reducing the size of the fee, filtering it through student government, and increasing the number and variety of recipients, does not entirely eliminate the objecting student's speech interest. The objectionability of requiring a Jewish student to contribute even indirectly, to an anti-semitic group, whatever the weight of that objectionability, is not entirely erased by also requiring the student to contribute to groups with which she is strongly sympathetic, or to a variety of other groups as well. One may note in passing the somewhat different issues raised by the fact that public university tuition supports the salaries of faculty members of varying and occasionally unpopular views.

organizations merely because the student unprotestingly pays a required activity fee.¹⁶³ The real free speech objection, from the standpoint of the objecting student, is not one of being misunderstood, but of something like a compelled loss of the student's integrity of world view. The student's basic public value scheme is arguably being violated unnecessarily. Whatever the weight of this speech interest, it is certainly a legitimate consideration.

Free speech interests are, however, on the other side of the case as well. The admittedly compelled student fee assessments amount to a subsidy of the speech of various organizations.¹⁶⁴ While what counts as a "subsidy" really depends upon a chosen baseline, this Article will herein simply assume a conventional baseline in determining what will qualify. Subsidies of speakers clearly tend to amplify the speakers' voices and implicate the free speech clause.¹⁶⁵ A subsidy of one, and certainly of many, student organizations from a general fee assessment need not amount to a zero-sum transfer in which the free speech gains to the subsidized groups are fully counterbalanced by genuine, inescapable losses in the ability of some or all of the subsidizing students to speak. It is certainly possible that the subsidizing students would otherwise have spent all or part of the relevant funds on items other than speech, and that they would be more likely to spend the funds on non-speech activities than the subsidized groups. Subsidies may thus increase speech overall. Thus, free speech interests are on both sides of the case.

If free speech issues are indeed on both sides of this kind of case, one should not expect to find the case outcome utterly obvious and entirely uncontroversial. The crucial point is the quite substantial weight that should be given to the public interest in a rich diversity of speech perspectives, particularly on a state's major university campuses. The number and diversity of subjects and speech perspectives represented by the subsidized campus groups could well be large.¹⁶⁶ There is certainly

¹⁶³ This issue was raised in dissent in *Wooley*, 430 U.S. at 721-22 (Rehnquist, J., dissenting). Justice Rehnquist found no required advocacy or required affirmation of belief in *Wooley*, given the very requiredness of the license plate and the possibility of disclaimer. *Id.*

¹⁶⁴ For discussion of a number of important issues associated with governmentally subsidized speech, see Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996).

¹⁶⁵ See, e.g., *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998) ("[T]he First Amendment certainly has application in the subsidy context . . ."); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 149 (1946) (finding that a post office may not deny subsidies on the grounds that the content of a given periodical is contrary to the public welfare).

¹⁶⁶ See *Southworth v. Grebe*, 151 F.3d 717, 720 (7th Cir. 1998) (listing eighteen organizations, ranging broadly as to subject matter, to whose funding the plaintiffs objected).

no guarantee that at any point in history, the qualifying campus groups will fairly and undistortedly represent the full spectrum of legitimate opinion. Nevertheless, no state agency will generally be entitled to discriminate among possible recipient groups on the basis of the group's viewpoint.¹⁶⁷

Actually, there is also no absolute guarantee that an offer to subsidize the speech of student groups will elicit more speech, or allow those groups to reach a broader audience, let alone encourage more groups to come into existence. These effects certainly would, however, be what one would ordinarily expect. Subsidies, after all, generally tend to evoke more of the subsidized activity.¹⁶⁸

Thus, one reason for constitutionally favoring the mandatory fees is that they can be said to expand the diversity of speech perspectives expressed on public university campuses. Of course, this need not be the only reason for favoring such fees. One could argue, a bit distinctly, that hearing from an optimally broad range of perspectives should be considered part of a major public university's broad educational function. Just as a good education might require exposure to poetry or statistics, so it could require exposure to many views on many subjects.

In any event, the value of a rich diversity of practically accessible views on many subjects seems central. After all, with or without the mandatory fees, there could still in a sense be "uncensored discussion and debate" on public university campuses, even from a baseline of no special fee subsidization.¹⁶⁹ Student groups would still be allowed to form and express their views otherwise unhindered by university restrictions. Free speech value is seen, however, in even compulsory subsidies of the student groups, as opposed to a more assumedly neutral rule of neither taxing nor specially subsidizing such groups. This is

¹⁶⁷ See, e.g., *Finley*, 118 S. Ct. at 2178-79; *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

¹⁶⁸ See, e.g., Michael H. Schill, *Distressed Public Housing: Where Do We Go from Here?*, 60 U. CHI. L. REV. 497, 524 (1993) (supply of housing); Tom Kuhnle, Note, *The Federal Income Tax Implications of Water Transfers*, 47 STAN. L. REV. 533, 557 (1995) (supply of water for irrigation).

¹⁶⁹ Thoe, *supra* note 157, at 1460. This is not to suggest that the absence of a 'subsidy' to speech is genuinely natural and neutral, and that any 'subsidy' to speech is artificial and distortive of what is natural. What counts as a subsidy or as a restriction may depend upon one's selected baseline. See generally Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

largely because subsidizing such groups, on a fair and equitable basis, will lead to a desirable expansion in the diversity of accessible speech. Typically, the value of the increased diversity of speech flowing from the subsidy system will outweigh the free speech costs also attributable to the compelled subsidy, including compelled speech or association.¹⁷⁰

VI. SOME OBJECTIONS AND CONCLUSIONS

Consequently, the diversity of perspectives articulated and practically available is crucially important, as a second-order value, to freedom of speech. A broad diversity of speech typically pays off in various ways, including as a social risk-reduction strategy akin to diversification in the various other contexts, including investments and biodiversity.¹⁷¹

This does not mean that every free speech case is, or should be, about maximizing diversity of speech. A speaker from even a dominant, well-represented perspective has a right against viewpoint-based discrimination.¹⁷² While subordinated groups will normally benefit from measures to increase speech diversity, it is also possible that the next new voice will turn out to be that of a previously unknown hate group.¹⁷³ Thus, we cannot rightly resolve every possible free speech case in favor of a generally unknown voice as against the government. Even in such a case, however, whatever diversity hate speech might bring may be restricted in order to protect and encourage the voices that have historically been commonly marginalized.¹⁷⁴ Restricting hate speech can easily be seen as promoting, rather than limiting, the effective diversity of speech, given the potential of hate speech for intimidating other speech.

Admittedly, other kinds of cases may arise in which it will be unclear which of two possible case results best promotes diversity of speech. Would it really promote diversity of political speech, for example, for public schools to spend a class period each on every form of monarchical and feudal regime, not as a matter of history, but as a supposedly eligible option, at the cost of a more superficial treatment of

¹⁷⁰ See Sunstein, *supra* note 169.

¹⁷¹ For a discussion of the many contexts of diversity, see *supra* Section III.

¹⁷² This is not to suggest that such a problem arises commonly; one would have to wonder how dominant a view really was, at the relevant jurisdictional level, if it could not legislatively prevent being discriminated against.

¹⁷³ See *supra* note 95 and accompanying text.

¹⁷⁴ See *supra* note 95 and accompanying text.

more realistic alternatives? Yet one can learn, opportunistically, even from generally ineligible options. How should one weigh subsidizing the third, fourth, or fifth most currently popular policy alternative against adding a new ninth, and least popular option, to that list? Which approach would best promote diversity? Will society always agree that a given alternative should be ranked as less popular, or as less well publicized, than another? This seems unlikely. Is diversity of thought better promoted by encouraging only moderately popular, or the currently least well publicized perspectives, or by encouraging the expression of utterly new, as yet entirely unexpressed perspectives?

These sorts of problems are unavoidable. Others could be added. Nevertheless, they really do not undermine the logic of enhancing free speech diversity. Reasonable cases can be made for answering the above types of questions in various ways. The best answers depend in part on the time frame, short or long, in which one is most interested. The best answers consistent with all of our relevant beliefs must simply be chosen. These sorts of problems are certainly not unique to a diversity focus, or even to approaches to freedom of speech. One can, for example, value the idea of equality in various contexts. However, the idea of equality is no more self-elaborating than the idea of diversity. Inescapably, one must confront many varied questions about how to define and measure equality.¹⁷⁵ One can, and should, undertake a similar task with respect to speech diversity.

To conclude, this Article responds briefly to an even more basic concern. This Article has grounded the value of free speech diversity in its usefulness in reducing serious social risks, and especially in the risks of unrecognized and uncorrected political error, just as diversity in other contexts reduces other sorts of risks.¹⁷⁶ Fallibility in matters of political judgment is a fact of life. Recognizing the risk of error in political judgments should not lead to some form of extreme risk aversion or even skepticism about making such judgments.¹⁷⁷ Are there not many political judgments in which one can have warranted confidence? Is it

¹⁷⁵ See, e.g., AMARTYA K. SEN, *INEQUALITY REEXAMINED* (1995); LARRY S. TEMKIN, *INEQUALITY* (1993) (noting, inter alia, differences in approach to inequality at the levels of averages, individuals, and groups, along with effects of population sizes, and other more technical measurement problems). For a more skeptical view, see Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

¹⁷⁶ See *supra* Sections II-IV.

¹⁷⁷ See, e.g., Joseph Raz, *Liberalism, Skepticism, and Tolerance*, 74 IOWA L. REV. 761, 763-64 (1989).

not possible to worry too much about the costs of mistaken and uncorrected political judgments, or about all sorts of risks in general?¹⁷⁸

It is certainly possible to spend too much in seeking to reduce any particular risk. The biodiversification represented by, for example, the snail darter may or may not be worth some necessary cost in economic development or job creation.¹⁷⁹ One might spend so much in hunting for the last possible increment of diversification of an investment portfolio that the spending on this quest exceeds any value the last scrap of diversification might bring. One may overestimate the likelihood and severity of particular risks,¹⁸⁰ or alternatively, one may be unreasonably fearful of risks more generally. There is a difference between prudence and paranoia.

Seeking to reduce serious social risks through increased diversity of speech need not be motivated, however, by any especially controversial attitude toward risk. One need not take a distinctively conservative attitude toward risk to see the "insurance" value of diversity of speech. In particular, one can reasonably seek to expand diversity of speech, for the sake of reducing the costs of avoiding or correcting political misjudgments, without believing that the likelihood of the worst possible political outcomes should always be minimized, at any cost.¹⁸¹

There may be situations in which, for example, one could further reduce the chances of some very serious political error, or of not being able to correct that error quickly, but the only way to do this would itself be costly. One might, in such a case, face a choice between a strategy of avoiding the most disastrous outcomes and of maximizing likely overall welfare.¹⁸² Certainly, it is not necessary to say that any additional

¹⁷⁸ See Henry Fairlie, *Fear of Living: America's Morbid Aversion to Risk*, NEW REPUBLIC, Jan. 23, 1989, at 14.

¹⁷⁹ For general discussion in the context of the Endangered Species Act, see *TVA v. Hill*, 437 U.S. 153 (1978) and the Act as subsequently amended, 16 U.S.C. § 1536 (e),(h) (1994).

¹⁸⁰ For some classic discussions, see JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982).

¹⁸¹ See JOHN RAWLS, A THEORY OF JUSTICE 152-57 (1971) (endorsing a "maximin" choice rule, under which the fate of the least well off group is to be heightened as much as possible, even at significant costs in overall or average social well-being). Rawls, it should be noted, endorses this risk averse, "maximize the minimum payoff" rule only for certain kinds of choices and contexts, and not universally. *Id.*

¹⁸² For a brief description of the strategy of maximizing expected utility, see, for example, Richard J. Zeckhauser & W. Kip Viscusi, *Risk Within Reason*, SCIENCE, May 4, 1990, at 559. For brief, informal contrasts of expected utility maximization and maximin strategies, see, for example, Richard Tuck, *The Dangers of Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 683,

reduction of any risk is worth paying any price.¹⁸³ One need not believe that any amount of further diversification and further risk reduction is always worth any price in order to believe, rightly, that promoting diversity of speech perspectives should be central to freedom of speech.

692 (1997); James W. Bowers, *Whither what Hits the Fan?: Murphy's Law, Bankruptcy Theory, and the Elementary Economics of Loss Distribution*, 26 GA. L. REV. 27, 31 n.13 (1991); Immaculada de Melo-Martin, *Ethics and Uncertainty: In Vitro Fertilization and Risks to Women's Health*, 9 RISK: HEALTH, SAFETY & ENV'T 201, 217-18 (1998).

¹⁸³ For brief criticisms of risk-averse maximin strategies compared to expected utility maximization strategies, see, for example, Mayer G. Freed et al., *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461, 497 (1983) (discussing maximin as preferring a certain two dollar return on a one dollar investment to a 99% chance of a million dollar return and a 1% chance of returning nothing, which would amount to the worst possible outcome); Herbert Hovenkamp, *The Limits of Preference-Based Legal Policy*, 89 NW. U. L. REV. 4, 6-7 (1994); Ralph M. Perhac, Jr., *Does Risk Aversion Make a Case for Conservatism?*, 7 RISK: HEALTH, SAFETY & ENV'T 297, 300 (1996). *But cf.* Jeffrey L. Harrison, *A Case for Loss Sharing*, 56 S. CAL. L. REV. 573, 598-99 (1983) (noting the popularity of maximin strategies in insurance contexts, in which "[p]eople typically are prepared to pay an amount that is certain, and in excess of expected losses, in order to avoid the possibility of incurring an even greater loss").